IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D., 1978

No. 78-887

COLONIAL BANK & TRUST COMPANY,
Petitioner,

vs.

DEPARTMENT OF FINANCIAL INSTITUTIONS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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To the Chief Justice of the United States and the Associate and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Honorable Court to issue a Writ of Certiorari to review the judgment of the Indiana Court of Appeals which reversed and remanded the decision of the Marion County Superior Court, Room No. 3, which reversed the findings of the Respondent, Department of Financial Institutions which denied the Petitioner a new state bank charter in Zionsville, Indiana. The Petition For Rehearing was denied on August 10,

1978, and the decision of the Court of Appeals of Indiana was dated May 11, 1978.

THE OPINION BELOW

The final opinion of the Indiana Court of Appeals which denied the Petitioner's application for a new bank charter which was granted by the Court below was dated May 11, 1978, under Cause No. 2-975-A-254 and has been cited as 375 N.E.2d 288.

STATEMENT OF JURISDICTION

Denial of the Petition For Rehearing to the Indiana Court of Appeals took place on August 11, 1978. The statutory provision believed to confer upon this Court is Title 28, United States Code, Section 1257 as amended. The Petitioner alleges no Petition to Review by State Supreme Court and appeals from Indiana Court of Appeals Decision.

QUESTION PRESENTED

Whether the Indiana Department of Financial Institutions' definition and usage of the "Public Necessity" requirement in chartering new state banks tends to create a regulated monopoly of banking in Indiana in violation of Federal Antitrust Laws.

CONSTITUTIONAL PROVISIONS INVOLVED

Whether the Petitioner's constitutional right to engage in the business of banking was violated by the actions of the Respondent and whether Respondent's action violated the due process provision of the Constitution of the United States and violation of the Sherman Antitrust Act 15 USCA Sections 1 and 2 and the Clayton Act Section 4, 15USCA Section 15.

STATEMENT OF THE CASE

An application for the organization of a new commercial banking institution to be known as Colonial Bank and Trust Company, located at 385 South Main Street, Zionsville, Boone County, Indiana, was filed with the Department of Financial Institutions on June 5, 1974, pursuant to IC 28-1-2-22 (R. 30, 239). A hearing on the application was held on July 12, 1974 and continued to August 2, 1974 in Zionsville, Indiana. (R. 29) ostensibly. On September 23, 1974 the Department of Financial Institutions issued its findings of fact, conclusions, and order which denied the application because, the Board said there was no public necessity for a new bank in the proposed service area of Colonial Bank and Trust Company (R. 30, 33). Notice of the appellants findings, conclusions and order was not received by Appellee until October 11, 1974, and was mailed on the date of October 8, 1974.

On January 10, 1975 the plaintiff Colonial Bank and Trust Company filed a Petition for Judicial Review, originally filed in Boone County on October 23, 1974 and venued to Marion County (R. 16). In April 1975 arguments were heard on the Petition for Judicial Review (R. 132-133). Both parties filed briefs on the substantive issues involved (R. 135-150, 163-180). On June 3, 1975 the court overruled defendant's Request to Include Omitted Documents (R. 181). The court concluded that the defendant's denial of plaintiff's application was arbitrary, capricious, contrary to law, and without proper procedure. The matter was remanded to the department for further proceedings. The court's findings of fact, decision and order, omitting caption and signature reads as follows:

FINDING OF FACTS AND DECISION

This matter is before the Court pursuant to a petition for judicial review filed by plaintiff Colonial Bank and Trust Company requesting a judicial review of the denial of its application to organize a new commercial bank in Zionsville, Indiana. The record in this matter shows that the defendant Department of Financial Institutions denied said application and issued its "Findings of Fact, Conclusions and Order" denying said application and that this matter was venued from the Boone County Superior Court to this Court for determination.

The Court will deal with the procedural questions raised by the parties first. After a review of the procedural questions involved, the Court has determined that the Department of Financial Institutions has committed serious procedural irregularities in this matter. The Administrative Adjudication Act, IC 1971, 4-22-1-1 through 30, establishes a uniform method of administrative adjudication to be followed in these matters. Also involved are certain procedural requirements as set out in the Financial Institutions Act, IC 1971, 28-1-2-25. The Department has chosen to interpret these rules in its own way, of which this Court does not altogether agree.

The Administrative Adjudication Act requires that notice of a decision or order by the Department of Financial Institutions shall be made to a party in writing and by certified or registered mail. In this matter, the Department admittedly failed to do this. It is noted that the application form supplied to the plaintiff required the plaintiff to furnish the name of a registered agent for the Department to deal with in matters relating to the application. In this case, the registered agent named in the application was "Dean E. Richards, Attorney

at Law, 156 East Market Street, 13th Floor, Inland Building, Indianapolis, Indiana". The Department's records do show that a notice of its determination and order relating to plaintiff's application was sent to "Dean E. Richards, Attorney at Law", at another address. For some unknown reason, "Ralph Atkinson" was listed by the Department as the applicant's representative in the Department's "Findings of Fact, Conclusions and Order".

Further, under IC 1971, 28-1-2-25, the Department is given sixty (60) days from the date of the hearing to either approve or disapprove said application. Plaintiff did not receive any notice of determination until after sixty (60) days had passed. This Court does not accept the Department's argument that so long as a decision is made within sixty (60) days from the hearing, the Department can give notice of its decision to an applicant any time it deems reasonable. This Court finds that the Department of Financial Institutions had failed to observe mandatory procedural requirements as set out under the Administrative Adjudication Act.

Further, the parties to this action have filed several pleadings which this Court has taken under advisement. The Court now overrules defendant's motion to dismiss plaintiff's petition for judicial review. The Court finds that the matters raised in defendant's motion are without merit. The Court further overrules requests of both parties to include additional documents into the transcript of this proceeding.

In reviewing the substantive issues presented by the plaintiff in this matter, the Court finds the Department of Financial Institutions, under IC 1971, 28-1-2-26, is required to investigate the applicant and make a determination relative to (1) the fi-

nancial standing and character of the incorporators or organizers, (b) the character and qualifications and experience of the officers of the proposed financial institutions, (c) the public necessity for the financial institution in the community in which such proposed financial institution is to be established and (d) the adequacy of the proposed capital of the proposed bank.

In the Department's "Conclusions", paragraphs b, c, and d, it determined the financial standing of the organizers to be satisfactory, it determined the character, qualification and experience of the officers to be satisfactory and it determined that the capitalization was adequate. Under paragraph g of said "Conclusions", the Department stated that there was no public necessity for applicant's proposed commercial bank.

Thus, the issue in this case is whether the Department's findings relative to the public necessity issue was either arbitrary and capricious, contrary to law or without observance of procedure required by law. From the reading of the Department's "Findings of Fact, Conclusions and Order", it is apparent that plaintiff's application was denied because the Department felt there was "no public necessity" for a new commercial bank in the community inasmuch as the banking needs of the service area were being well served by the existing financial institutions doing business in the proposed service area.

This Court's review of actions of the Department of Financial Institutions, as with any administrative agency, is severely limited. This Court can only review the facts appearing in the certified record of the agency's proceedings which led to its decision. This it has done. The Department of Financial Institutions, and not this Court, determines the issues of fact and this Court cannot and will not

weigh conflicting evidence in the record. This Court has only to affirm or remand this matter to the Department for further proceedings. In this matter the Court finds no need to weigh the evidence or to disturb the "Findings of Fact" and "Conclusions" made by the Department in this matter.

The issue in this matter is whether the Department properly construed the meaning of "public necessity" as set out in IC 1971, 28-1-2-26. The Department has construed the meaning of "public necessity" in its absolute literal sense as shown in paragraph g of its "Conclusions" wherein it "there is no public necessity at this time for applicant's proposed commercial bank in the community in which such proposed bank is to be established, inasmuch as the banking needs of the applicant's proposed service area, are being well served at this time by the several financial institutions doing business in the proposed service area of the applicant."

This Court finds that said construction of the term "public necessity" by the Department is improper. This provision in the Act is for the public protection and not for the protection of existing financial institutions. It was passed, not to prevent new banks from entering into the market place, but to insure the existence of a healthy banking system in a given community. As set out in *State ex rel. Dybdal* v. *State Securities Commission,* 145 Minn. 221, 176 N.W. 759, 760 (1920), the Minnesota Supreme Court construed a "reasonable public demand" chartering provision as follows:

> ". . . It (the statute) does not intend that one or more established banks may keep out another because the banking facilities sufficiently take care of the banking business. Its purpose is not to deter competition or foster monopoly, but to guard the public and public interests against imprudent banking."

The Michigan Supreme Court in *Morgan* v. *Nelson,* 322 Mich. 230, 33 N.W. 2d 772, 778 (1948), likewise rejected a reading of "need" or "necessity" in the absolute sense and ordered a bank charter to issue, even though the area to be served by the new bank was well served by several well established banks. A recent case also adopting this interpretation is *Central Bank of Clayton* v. *State Banking Board of Missouri,* 509 S.W.2d 175 (1974).

If the Department of Financial Institutions would be allowed to construe the term "public necessity" in the absolute literal sense they have employed in this case, it would tend to deter competition and foster a monopoly. This Court does not believe that the Financial Institutions Act intended to create a regulated monopoly of banks in Indiana. That further the Court notes that the "Findings of Facts, Conclusions and Order" shows that, of the seven member board, five new members including a new chairman, were appointed shortly before the Department's ruling and that the new board could have been unfamiliar with the consequences of its literal interpretation of the "public necessity" provisions.

If, in this matter, the Board had found that another bank in the designated service area would have tended to seriously injure the existing financial institutions already there, and bring about bank failures, then the Department could properly restrict competition in order to promote banking safety. In the present case, however, the Department failed to find any such conditions endangering banking safety and this Court states that there is no substantial evidence in the record of the proceedings to support such a finding if it had been made.

ORDER

It is therefore found by this Court that the Department's denial of plaintiff's application was arbitrary and capricious and that said Department's decision was contrary to law and without observance of procedure required by law and that this matter is hereby remanded to the Department for further proceedings. This Court further retains jurisdiction of this case pending further determination by the Department.

On July 21, 1975 the plaintiff Colonial Bank & Trust Company filed a Motion to Compel Action (R. 189-191). The court ordered the defendant Department of Financial Institutions to show cause why within twenty (20) days the re-determination as previously ordered by this court had been withheld or delayed (R. 193). On July 23, 1975 the defendant Department of Financial Institutions filed a Petition to Stay the court's order of July 21, pending disposition of defendant's Motion to Correct Errors (R. 196-199). Said petition was granted until August 21, 1975 (R. 200). The defendant filed a Motion to Correct Errors on July 31, 1975 (R. 202-210). On August 21, 1975 a hearing was held on plaintiff's Motion to Compel Action and on defendant's Petition for Stay and Motion to Correct Errors. The cause was taken under advisement with the parties requested to submit briefs by August 29. (R. 211). The defendant submitted its memorandum on August 28, 1975 (R. 212-221), and the plaintiff's memorandum was filed on September 9, 1975 (R. 223-228). On September 10, the court overruled defendant's Petition to Stay and Motion to Correct Errors. (R. 229). On September 30, 1975 the defendant filed a Praecipe (R. 231). The defendant's Motion to Clarify the Court's Order, filed on November 6, 1975, was overruled (R. 233-236).

On November 20, 1975 the defendant Department of Financial Institutions held a hearing (R. 25-124). On December 18, 1975 the members of the Department reviewed the transcripts and exhibits of the hearings held on July 12, 1974, August 2, 1974 and November 20, 1975 and again denied the plaintiff's application (R. 127). On January 14, 1976 the defendant issued findings of fact, conclusions and an order (R. 243-252). The plaintiff filed a Petition for Further Judicial Review on January 30, 1976 (R. 239-241). The court issued a Notice of Hearing ordering the defendant to file with the court a copy of the transcript of the proceedings of November 20, 1975 and to appear on March 12, 1976 for a hearing to ascertain whether the defendant complied with the court's order of June 3, 1975 (R. 271). The hearing was continued, at defendant's request, to March 29, 1976 (R. 295). The hearing was held on March 29, 1976 (R. 299-345). The court determined on May 6, 1976 that the defendant's denial of plaintiff's application for a charter was not supported by substantial evidence and ordered the defendant to approve the application within ten (10) days and deliver the charter to the court (R. 361). The court's findings of fact, conclusions and order omitting caption and signature, read as follows:

FINDINGS OF FACT

This matter is again before the Court pursuant to a petition for judicial review filed by plaintiff Colonial Bank and Trust Company requesting a judicial review of the denial of its application to organize a new commercial bank in Zionsville, Indiana.

An application for the organization of the new commercial banking institution to be known as Colonial Bank and Trust Company, to be located at

385 South Main Street, Zionsville, Boone County, Indiana was filed with the Department of Financial Institutions on June 5, 1974, pursuant to IC 1971, 28-1-2-22.

The requisite notices were published and the hearing was held on the application on July 12, 1974 at which time the plaintiff herein presented evidence in support of its application. The hearing was continued by the Department of Financial Institutions, but before the next hearing was held on August 2, 1974, a new Board was named to the Department of Financial Institutions by the Governor of Indiana. At the continued hearing on July 12, 1974, the new Board heard the remainder of the plaintiff's evidence in behalf of the application and heard in full the two remonstrator's cases in opposition to the granting of a new charter.

The record shows that the defendant Department of Financial Institutions denied the application in its "Findings of Fact, Conclusions and Order" issued to applicant on October 11, 1974 (by letter dated October 8, 1974) which was purportedly made on September 23, 1974. A law suit was filed thereafter, and this matter was venued from the Boone County Superior Court to this Court for judicial review.

The Court, in its Decision of June 3, 1975, dealt with the procedural questions raised in the review and the Court determined that the Department of Financial Institutions had committed serious procedural irregularities in this matter. The Administrative Adjudication Act, IC 1971, 4-22-1-1 through 30, established the procedure to be followed, in addition there were certain procedural requirements set out in the Financial Institutions Act, IC 1971, 28-1-2-25. The Court found, and still finds, that the Department interprets these rules in a manner not in compliance with the Acts.

The Administrative Adjudication Act requires that notice of a decision or order by the Department of Financial Institutions shall be made to a party in writing and by certified or registered mail. The Department admittedly failed to do this. It is noted that the application form supplied to the plaintiff required the plaintiff to furnish the name of a registered agent for the Department to deal with in matters relating to the application. In this case, the registered agent named in the application was "Dean E. Richards, Attorney at Law, 156 East Market Street, 13th Floor, Inland Building, Indianapolis, Indiana". The Department's records show that a notice of its determination and order relating to plaintiff's application was sent to "Dean E. Richards, Attorney at Law," but not to the correct address listed. For some unknown reason, "Ralph Atkinson" was listed by the Department as the applicant's representative in the Department's "Findings of Fact, Conclusions and Order."

Further, under IC 1971 28-1-2-25, the Department is given sixty (60) days from the date of the hearing to either approve or disapprove said application. Plaintiff did not receive any notice of determination until after sixty (60) days had passed. This Court did not and does not accept the Department's contention that so long as a decision is made within sixty (60) days from the hearing, the Department can give notice of its decision to an applicant any time it deems reasonable. This Court found that the Department of Financial Institutions had failed to observe mandatory procedural requirements as set out under the Administrative Adjudication Act.

This Court is aware that a decision or verdict of the administrative agency is contrary to law if any statute, constitutional provision, legal principle or rule of substantive or procedural law has been violated. This Court finds that the procedural rules

as required by the Administrative Adjudication Act, have been violated, with harm to the applicant bank, by reason of the failure of the Department of Financial Institutions to notify the applicant Colonial Bank of the initial denial of its charter within the sixty (60) day period required by statute.

In reviewing the substantive issues presented by the plaintiff in this matter, the Court found the Department of Financial Institutions, under IC 1971, 28-1-2-26, is required to investigate the applicant and make a determination relative to (a) the financial standing and character of the incorporators or organizers, (b) the character and qualifications and experience of the officers of the proposed financial institution, (c) the public necessity for the proposed financial institution in the community in which such proposed financial institution is to be established and (d) the adequacy of the proposed capital of the proposed bank.

The Department in its original "Conclusions" (in paragraphs b, c, and d) determined the financial standing of the organizers to be satisfactory, determined the character, qualification and experience of the officers to be satisfactory and determined that the capitalization was adequate. Then, in paragraph g of said "Conclusions", the Department stated that there was "no public necessity" for applicant's proposed commercial bank. The Court, after reviewing carefully the Record and from reading the Department's original "Findings of Fact, Conclusions and Order," determined that plaintiff's application was denied solely because the Department felt there was "no public necessity" for a new commercial bank in the community, based on the Department's finding that: "there is no public necessity at this time for applicant's proposed commercial bank in the community in which such proposed bank is to be established, inasmuch as the

banking needs of the applicant's proposed service area, are being well served at this time by the several financial institutions doing business in the proposed service area of the applicant."

This Court found that the application of the requirement "public necessity" by the Department was improper and that this provision in the Act is for the public protection and not for the protection of existing financial institutions and was passed, not to prevent new banks from entering into the market place, but to insure the existence of a healthy banking system in a given community.

The Court further determined that if the Department of Financial Institutions would be allowed to apply the requirement "public necessity" in the absolute literal sense they had employed in this case, it would tend to deter competition and foster a monopoly. This Court stated, and still believes, that the Financial Institutions Act was not intended to create a regulated monopoly of banks in Indiana.

The Court found that if the Department, based on substantive evidence, had found that another bank in the designated service area would have tended to seriously injure the existing financial institutions already in the service area, and bring about bank failures, then the Department could have properly restricted competition in order to promote banking safety. The Court noted however, that the Department failed to find any such conditions endangering banking safety and this Court stated that there was no substantial evidence in the record of the proceedings to support such a finding if it had been made.

As a result of the findings made in the judicial review, the Court on June 3, 1975, found that the Department's denial of plaintiff's application was arbitrary, capricious, contrary to law and without observance of procedure required by law. The Court

remanded the matter to the Department for further proceedings not inconsistent with the Court's findings. The Court retained jurisdiction of this case pending that further determination by the Department as ordered.

After several delays by the Department, an additional hearing to determine "public necessity" pursuant to the order of this Court was finally held, on November 20, 1975. The Department and the plaintiff stipulated as to records and that the only issue was the "public necessity" issue.

The Department in its Order dated January 14, 1976, Ordered that the charter for the new bank be again denied. This was based upon the following findings and conclusions:

"7. That according to the official published call reports, Midwest National Bank has operated at a loss since it's inception in 1972;

8. That according to the call reports Midwest National Bank lost approximately $198,000 in 1974, and lost approximately $56,000 in the first six months of 1975. (Transcript pp. 40,40);

9. That Midwest National Bank advertises widely within applicants trade area and that Midwest service area overlaps with the service area which applicants propose which would result in increased competition for Midwest National Bank which is presently experiencing financial difficulties. (Transcript pp. 42, 53, 61);

10. That Carmel Bank and Trust Company has lost money since it came into existence according to the Call Reports;

11. That Carmel Bank and Trust lost approximately $114,000 before special charges of $21,113 in 1974, and lost approximately

$60,000 in the first six months of 1975. (Transcript pp. 46, 47);

12. That Carmel Bank and Trust Company advertises in the same trade area as the proposed Colonial Bank and Trust Company and that the two trade areas actually overlap. (Transcript pp. 42, 53, 61);

13. That the granting of a bank charter at the proposed site might tend to cause serious harm at this time to two existing financial institutions which are presently experiencing financial problems.

CONCLUSIONS

A. Midwest National Bank has operated unprofitable from the date of its opening in 1972; it incurred an operating loss of $198,000 in 1974, and continued to operate unprofitable during the first six months of 1975, the most recent period for which figures are available, losing an additional $56,000, resulting in a diminution of its undivided profits account to only $39,155.

B. Carmel Bank and Trust Company operated unprofitably during the first six months of 1975, the most recent period for which figures are available.

C. Both Midwest National Bank and Carmel Bank and Trust and Company operate, advertise and compete for banking business within the proposed service area.

D. The chartering of another commercial bank within Applicant's proposed service area will tend to seriously injure at least two existing commercial banks now operating within Applicant's proposed service area, and possibly bring about a bank failure of

an existing bank now operating within Applicant's proposed service area.

E. Based upon the requirement of "public necessity" as set forth at IC 1971, 28-1-2-6 and as further defined by Judge Barteau's Order of June 3, 1975, there is not at this time a "public necessity" for a new commercial bank in Applicant's proposed service area."

This Court now finds, after a review of all the evidence which appears in the record of the various hearings, that there is no substantial evidence to support the Order of the Department of Financial Institutions in denying the applicant Colonial Bank and Trust Company a charter for a new bank.

This Court has not attempted to review the evidence and make its own special findings of fact which are contrary to those of the Department of Financial Institutions. This Court, in reviewing the action of the Department is aware that under the law it has no right to weigh conflicting evidence or to chose that evidence which it sees fit to rely on. The Court has not done so, as it is aware that the Administrative Adjudication Act gives this fact finding function solely to the adminstrative body. However, This Court has determined that there is no substantial evidence to support the findings, conclusions and order of the Department of Financial Institutions and that their action was arbitrary and capricious and contrary to the law.

This Court finds that there is no evidence of probative value to support the Findings and Conclusions of the Department of Financial Institutions at the rehearing of November 20, 1975, there was one witness; namely Thomas Gruhl, president of the remonstrator Farmer's State Bank, which is located within the City of Zionsville, Indiana approximately two or three blocks from the proposed

site of Colonial Bank and Trust Company. Thus, the service area for the new bank would be the same as the service area for Farmer's State Bank. Yet, the witness Thomas Gruhl, when asked how many banks were located in the service area of Farmer's State Bank, stated:

> "A. I would say approximately five or six.
>
> Q. Five or six. And would you name them for the Board?
>
> A. Citizens Bank has a Whitestown branch that would be; Boone County State Bank has a branch at Eagle Village; Fidelity Bank of Indiana has a branch on North Michigan Road at Mayflower; Indiana National Bank and Merchants National Bank of Indianapolis have branches in the—I believe it would be—I'm not sure what hundred block, its just east of Zionsville Road on 86th Street." (Hearing tr. pp. 55, 56)

The Court notes that it is only in the most recent and Conclusions that the Department has claimed that the Midwest National Bank and the Carmel State Bank are competitors in the proposed service area. In fact, the Board found in its determination in Finding ♯9 that:

> "Applicant's proposed service area will include the city of Zionsville and all or portions of Eagle, Union, and Worth Townships with the primary service area being located in the southern corner of Boone County. In addition, Applicant's proposed service area will include a small part of extreme northwestern Marion County and a small portion of southeastern Hamilton County."

Other than mentioning in Finding ♯10 of the first determination that residents of Boone County have "close economic ties with Marion County," there was no finding that Midwest National Bank or Carmel Bank were competitors in the service

area. In Finding ♯14, the Board did mention some Marion County banks whose service area overlapped that of the proposed new bank, as follows:

> "Immediately adjacent to Applicant's proposed service area to the south and east, People's Bank and Trust Company, American Fletcher National Bank, Indiana National Bank and Merchant's National Bank and Trust Company have in operation or proposed six branch offices. Service areas of these branch banks overlap to a large extent with Applicant's proposed service area."

However, Midwest National Bank is not mentioned, showing this Court that only as an after thought has the Department brought in the Midwest National Bank as a factor.

Moreover, the Finding that "Carmel Bank and Trust Company has lost money since it came into existence" in 1974 is very misleading, especially since it was brought out that a new bank, Fidelity Bank, located much closer to the proposed service area of applicant bank, was doing very well. Moreover, the evidence does not show Midwest National Bank and Carmel Bank are in the "service area" of the applicant bank. Further, in the brief and the proposed findings by the Department, and in the new additional Findings and Conclusions, the Department has tried to interchange the terms "service area" and "trade area." The two terms, however, are not interchangeable as stated in oral argument. The Department itself has admitted that the proposed service area does not include Midwest National Bank and the Carmel State Bank. The Court finds the Department has arbitrarily and capriciously varied the terminology of the statutory requirements in an effort to deny to the plaintiff a charter.

In its decision of June 3, 1975 the Court found that the construction of the term "public necessity"

by the Department was improper. The Court found that the Department was construing public necessity in such a way that it was being used for the protection of existing financial institutions and not for the public's protection. This Court found that the Department was in practice construing the requirement of "public necessity" to prevent new banks from entering into the market place and not to insure the existence of a healthy banking system in a given community or service area. This Court noted that if the Department was allowed to continue using and construing the term "public necessity" in the absolute literal sense it had been employed, it would tend to deter and discourage competition and foster a monopoly among the existing banks. This Court stated that if the Department had, based upon the substantive evidence before it, found that another bank in the "designated service area" would have tended to seriously injure the existing financial institutions already there and to bring about bank failure in the designated service area, the Department could have properly restricted competition in order to permit banking safety and to protect the public. But, the Court found that there was no substantial evidence in the record to support such finding if it had in fact been made.

The Court now finds that at its rehearing on November 20, 1975 the Department made such a finding, but that finding was not based upon any substantive evidence before it. True, there was some evidence that there were two newly formed banks at a distance from the service area which were showing a "loss" position, however, there was no evidence that this loss position was not the normal and expected loss that new banks would experience or that bank failure was expected. The Court notes that the exhibits by the Applicant bank showed that it would be in a "loss" position for a period of four

years, a condition the Department accepted as normal.

The president of Farmer's State Bank who was the chief witness in the hearing could not state that the five banks in his service area did not make a profit. He did state that two of the banks, Indiana National Bank and Merchants National Bank, did make money (tr. p. 56).

The president of the protestant Farmer's State Bank acknowledged that, while originally he had stated that Midwest National Bank in Indianapolis, Indiana and Carmel Bank in Carmel, Indiana had been "losing money" as shown by their reports to the Director of the F.D.I.C., he did not know whether this "loss position" was ahead or behind the projected earning schedule they had filed with the Department of Financial Institutions in that Banks had just recently opened" (tr. p. 58). The president of Farmer's State Bank stated that his bank did make money during the previous year and its deposits were up for the year (tr. p. 60).

The Court finds that the Department expects new banks to experience a projected loss situation for some years after their opening, as they did with the applicant bank. The Court finds the Department has misused testimony of the normal expected occurrence upon which to base a finding that the Midwest National Bank and the Carmel State Bank are threatened by the proposed bank and that there was no evidence of probative value to support such a Finding or Conclusion.

This Court is further aware that the expressed intent of the Administrative Adjudication Act was to limit the reviewing Court's authority to remand a case to the administrative agency for further proceedings after the proper determination has been made that the agency's decision was without ob-

servance of procedure and was contrary to the law. This the Court has previously done. This Court is also aware that it has the power, if upon remand to the administrative agency, the agency unlawfully withholds or unreasonably delays the redetermination of the case, to compel agency action by direct order. This the Court is reluctant to do unless a clear case for it is shown. In this case, the Court herein finds that the Department of Financial Institutions has delayed, for an unreasonable length of time, the proper rehearing of the applicant's case and further finds that the rehearing held on November 20, 1975 did not meet with the instructions given to the Department by this Court when it ordered the rehearing. This Court further finds that the rehearing of November 20, 1975 was but another attempt at circumventing the Court's previous order and was a continuation of the Department of Financial Institutions to deny, without basis in substantive evidence or law, the application of Colonial Bank and Trust Company for a State Banking charter.

The Court acknowledges the general rule of law that arbitrary or capricious action (as envisioned in Administrative Adjudication Act) is action taken without some basis which would lead a reasonable and honest man to such action. The Court now finds that the denial to the application Colonial Bank of a State banking charter was such an arbitrary or capricious action as was taken without basis (namely the law of Indiana or being based upon substantial facts to support the action taken) as would lead a reasonable and honest man to such an action.

This Court, looking to the evidence of probative value which tends to support the determination by the Department of Financial Institutions and permitting all inferences from that evidence which are most favorable to the decision by the Department,

now determines that the action of the Department is not supported by substantial evidence or inferences to be drawn therefrom.

This Court is aware that the Administrative Adjudication Act requires this Court on judicial review to not try to determine the cause *de novo*, but "the facts shall be considered and determined exclusively upon the record filed with said Court pursuant to this Act." The law also states that if the administrative agency's "finding, decision or determination is supported by substantial, reliable and probative evidence, such agency's finding, decision or determination shall not be set aside or disturbed herein." Pursuant to the requirements of the statute and the law, this Court has considered and determined exclusively upon the record filed with this Court of the evidence given before the Department in its various hearings. The Court has not tried the matter as a new action nor has it weighed the evidence to determine the facts as in appeal *de novo*.

This Court now finds there is not substantial evidence to support the Findings, Conclusion and Order of the Department and it finds that the action by the Department in denying the applicant bank a new charter constituted an abuse of discretion and was arbitrary and capricious as revealed by the uncontradicted facts. Thus it also finds that the Department's Findings, Conclusions and Order ignores and attempts to circumvent this Court's order of June 3, 1975; that the Department has unlawfully and unduly delayed these proceedings in order to discourage the investors and deny the granting of a charter to the applicant Colonial Bank and Trust Company. The Court finds that the Department's Findings, Conclusions, and Order denying the application to charter a state bank in Zionsville, Indiana should not be allowed to stand.

> Upon the Court's finding that the denial of the charter is not based upon substantial evidence, and because the evidence shows the Department of Financial Institutions has unlawfully withheld and unreasonably delayed action upon the application for a charter, the Court now Orders the Department of Financial Institutions to approve the Plaintiff's application and to issue and deliver the charter to this Court within ten (10) days of this Order. Wherein this Court will then make final disposition herein. Colonial Bank and Trust, plaintiff herein, is Ordered not to begin business until it obtains federal deposit insurance from the Federal Deposit Insurance Corporation and permission from this Court.

On May 13, 1976 the defendant filed a Petition to Stay the court's May 6 order pending appeal (R. 371-372) which petition was denied (R. 374). On May 17, 1976 the defendant filed a Motion to Correct Errors (R. 1-13, 382-394), which motion was overruled (R. 373, 395), and a Praecipe for the transcript (R. 399). Briefs were filed and on May 11, 1978 the Indiana Court of Appeals issued its decision. (See Appendix A). Petitioner filed its Petition For Rehearing on May 30, 1978 and the Indiana Court of Appeals denied said Petition on August 10, 1978. That Petitioner now seeks a Writ of Certiorari before this Honorable Court.

REASONS FOR GRANTING WRIT

The Petitioner argues that the Indiana Department of Financial Institutions definition and usage of the public necessity requirement in deciding whether to charter new state banks in Indiana tends to foster a regulated monopoly of banking in Indiana which results in violations of the Federal Antitrust Laws. The present law of Indiana pro-

vides for a determination as to whether there is sufficient public need or necessity to justify the granting of an application for a new bank charter requires that decision to be made by seven (7) persons which is composed of the members of the Indiana Department of Financial Institutions. Included in the seven (7) persons must be at least five (5) Board Member who have "practical experience at the executive level" of financial institutions and remaining consideration to be given to the "consumer, agricultural, industrial and commercial interest of the state" in the appointment of the remaining members only, IC 28-1-2-2 as amended by 1974, PL 127, Section 1, Page 536. Thus, in Indiana the regulation of financial institutions are governed by a State Administrative Board of which five (5) of the seven (7) members are required by law to be executives from the various financial institutions existing in Indiana. This results in an industry governing itself.

The Department of Financial Institutions in denying Petitioner's application stated that all requirements were met by the Petitioner to form a new state bank with the exception of the failure of the Petitioner to show that there was sufficient "public necessity" to allow a new bank in the service area where the proposed bank was to be located. The Department of Financial Institutions in construing the meaning of "public necessity" as set out in IC 1971, 28-1-2-26 in its Findings Of Facts And Conclusions stated that "There is no public necessity at this time for applicant's proposed commercial bank in the community in which such proposed bank is to be established, insomuch as the banking needs of the applicant's proposed service area, are being well served at this time by several financial institutions doing business in the

proposed service area of the applicant". The Petitioner argues that said construction of the term "public necessity" by the Department is improper even though twice affirmed by the Indiana Court of Appeals in its present decision and in the case of *Farmers State Bank, LaGrange* v. *Department of Financial Institutions,* 355 N.E. 2d 277. The Petitioner argues that the provision cited above in the Act is for the public protection and not for the protection of existing financial institutions. It was passed, not to prevent new banks from entering into the marketplace but to insure the existence of a healthy banking system in a given community as set out in *State ex rel Dybdal* v. *State Securities Commission,* 145 Minn. 221, 176 N.W. 759, 760 (1920), the Minnesota Supreme Court construed a "reasonable public demand" charting provision as follows:

> ". . . If (the statute) does not intend that one or more established banks may keep out another because the banking facilities sufficiently take care of the banking business. Its purpose is not to deter competition or foster monopoly, but to guard the public and public interests against imprudent banking."

The Michigan Supreme Court in *Morgan* v. *Nelson,* 322 Mich. 230, 33 N.W. 2d 772, 778 (1948), likewise rejected a reading of "need" or "necessity" in the absolute sense and ordered a bank charter to issue, even though the area that is to be served by the new bank was well served by several well established banks. A recent case also adopting this interpretation is *Central Bank of Clayton* v. *State Banking Board of Missouri,* 509 S.W. 2d 175 (1974). The Central Bank of Clayton case stated:

> "It is not possible to give effect to legislative intent expressed in this statute by construing 'the

> convenience and needs of the community' in light of the plain and ordinary meaning of the words.

In the case of *Mashak* v. *Poelker,* 367 S.W. 2d 625, 623, the words themselves speak of "nebulous concepts". *Bank of New Bern* v. *Wachovia Bank & Trust Co.,* 353 F. Supp. 643, (E.D.N.C. 1972).

> "This statute is on its face written in vague and abstract language, and it will not suffice to say, as Respondent suggests, that the legislation intended that the Board give percise meaning to the statutory working. Where words in a statute are on their face so abstract as to lack any limitation, as here, such interpretation of legislative intent would give the Board the power of roving commission, free in each particular case to pick and choose from amount the possible endless categories of issues and evidence."

In the present case as shown in the lower Court's opinion and by reaffirming the *Farmers State Bank, LeGrange* decision the Indiana Court of Appeals has allowed the Department of Financial Institutions to "pick and choose" issues and doctrines to use to deny new bank charters in Indiana. In the *Farmers State Bank, LeGrange* (supra) public necessity was interpreted as follows:

> "Public necessity has been defined as a substantial or obvious community need in light of the attendant circumstances. It requires more than mere convenience but less than absolute or indispensable need. However, convenience may be properly considered when supplemented by facts and circumstances persuasive of necessity."

The Petitioner argues that to allow this interpretation of a legislative intent to stand would give the Indiana Department of Financial Institutions the right to protect one existing bank in the area and the surrounding banks

from further competition as in the present case. The Board conduct such as in the present case inhibits lawful competition in the banking community and tends to create a regulated monopoly and the application of the Sherman Antitrust Act and the Clayton Act would be justified. ***United Mine Workers*** **v.** ***Pennington,*** 381 U.S. 657, 85 S. Ct. 1585, (1965). ***California Motor Transport Co.*** v. ***Trucking Unlimited,*** 404 U.S. 508, 92 S. Ct. 609. ***Central Bank of Clayton*** v. ***Clayton Bank,*** 424 Fed. Supp. 163 (1967). That further, in ***United States*** v. ***Philadelphia Nat. Bank,*** 374 U.S. 321, 10 L.Ed. 2d 915, 83 S. Ct. 1715 this Court stated:

> "Competition among banks exists at every level—price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous, special and extra services—and it is keen;
>
> There is no reason to think that concentration is less inimical to the free play of competition in banking than in any other services industries. On the contrary, it is all probability more inimical. For example, banks compete to fill the credit needs of businessmen. Small businessmen especially are, as a practical matter confined to their locality for the satisfaction of their credit needs. If the number of banks in the locality is reduced the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage vis-a-vis larger businesses with which he competes."

The Petitioner further argues that the New Jersey Supreme Court in application of ***Howard Savings Institution of Nurich,*** 32 N.J. 29, 159 A. 2d 113, (1959) held that:

> "But absolutely necessity for further facilities is not essential. The public should always be entitled to increase the interest rates and greater services and convenience which proper competition may well bring. Mere sufficience of existing facilities in the sense of some existing banking facilities more or less appropriately located in an area and furnishing the usual gambit of services, is not in and of itself sufficient basis to deny establishment of a new institution or branch if the general economy of the area and its reasonable potential are such that there is room for a further installation without causing excessive competition with real harm to any institution or unduly affecting the banking structure at large."

Similarly in *Wall* v. ***Fenner,*** 76 S.D. 252, 76 N.W. 2d 722, (1956) the South Dakota Court rejected the view that because there are adequate (existing banking facilities) that public convenience and necessity justifying another bank cannot exist, and said:

> "If such were the case the statute would tend to deter competition and foster a monopoly." See also ***Banking Board*** v. ***Turner Industrial Bank,*** 165 Col. 147, 437 P. 2d 531, (1968). ***Wilmington Savings Fund Society*** v. ***Green,*** 300 A. 2d 227, (1972). ***First Federal Savings & Loan Assoc.*** v. ***Department of Banking,*** 188 Neb. 215, 196 N.W. 2d 105, (1972). Application of ***State Bank of Plainfield,*** 61 N.J. super. 150, 160 A. 2d 299, (1960); and ***Chimney Rock National Bank of Houston*** v. ***State Banking Board,*** 376 S.W. 2d 595 (Tex. Civ. App. 1964).

CONCLUSION

Petitioner prays that a Writ of Certiorari issue and that the decision of the Indiana Court of Appeals be reviewed and reversed and remanded for further proceedings not inconsistent with an appropriate opinion.

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Colonial Bank & Trust Company

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APPENDIX

Appendix A

IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

DEPARTMENT OF FINANCIAL INSTITUTIONS, *Appellant* (Defendant Below), vs. COLONIAL BANK & TRUST COMPANY, *Appellee* (Plaintiff Below).	No. 2-975-A-254

APPEAL FROM THE MARION SUPERIOR COURT, NUMBER THREE

The Honorable Betty Barteau, Judge

Attorneys for Appellant:
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CASE SUMMARY

BUCHANAN, C.J.—The Department of Financial Institutions (Department) appeals a decision by the Marion Superior Court, Number Three, reversing its denial of Colonial Bank & Trust Co.'s (Colonial) application to establish a new commercial banking institution, claiming that any procedural errors by the Department were harmless, that the court misinterpreted "public necessity" as stated in IND. CODE 28-1-2-26, and that the denial by the Department was supported by substantial evidence.

We reverse.

FACTS

On June 5, 1974, Colonial filed with the Department its application for organization of a new commercial bank in Zionsville, Indiana. After hearings, the application was denied on September 23, 1974, due to a lack of a public necessity for a new bank in the proposed service area.

Colonial petitioned for judicial review. The trial court set aside the denial, finding that the Department had incorrectly interpreted "public necessity" as used in IND. CODE 28-1-2-26,[1] and that the Department had failed to meet two statutory procedural requirements.

---

[1] Ind. Code 28-1-2-26 states:

> Upon the filing of such application, the department shall make, or cause to be made, a careful investigation and examination relative to the financial standing and character of the incorporators or organizers, the character, and qualifications and experience of the officers of the proposed financial institution, of the *public necessity for the financial institution in the community in which such proposed financial institution is to be established,* and, if the institution is to be a bank or trust company, of the adequacy of the proposed capital thereof; and *if the members of the department, after the hearing, as hereinbefore provided, shall determine either of such questions unfavorably to such applicants, the application shall not be approved,* and if all such questions be determined favorably, the application shall be approved. (Emphasis added)

Pursuant to the trial court's order, the Department held another hearing. On January 14, 1976, the application was again denied.

Colonial filed a Petition for Additional Judicial Review. The trial court, on May 6, 1976, found the denial was not supported by sufficient evidence, and ordered the Department to approve the application and issue a charter for the new bank.

The Department appeals.

ISSUES

Three issues are presented:

1. What was the effect of certain procedural irregularities in notifying Colonial of the Department's decision?
2. Did the trial court correctly define public necessity, as stated in IND. CODE 28-1-2-26?
3. Was the Department's decision supported by any substantial evidence?

As to Issue One, the Department argues that any procedural irregularities were harmless, and therefore could not be a basis for reversing its decision. Colonial maintains it was harmed by procedural irregularities in that it did not receive the form of notice to which it was entitled by statute.

As to Issue Two, the Department contends that the trial court erred by defining "public necessity" too broadly. Colonial asserts that the court's definition was correct and in accord with case law.

As to Issue Three, the Department contends that given the proper definition of "public necessity" there was substantial evidence to support its decision. Colonial maintains that the trial court using its own correct definition of "public necessity" properly found the Department's decision was not supported by substantial evidence.

DECISION

Issue One

CONCLUSION—Procedural irregularities in notifying Colonial of the Department's decision, if they existed, were harmless and could not be the basis for reversing the Department's decision.

The trial court found two procedural irregularities in providing Colonial with notice of the Department's decision. First, the Department failed to notify Colonial of its decision by certified or registered mail as required by IND. CODE 4-22-1-1 through 30. Second, the Department failed to give such notice of its decision within sixty (60) days from the date of the hearing, as required by IND. CODE 28-1-2-25.

The Department concedes that notice was not given by certified or registered mail. But it disputes that IND. CODE 28-1-2-25 requires notice of the Department's decision must be given within sixty (60) days.

We need not reach a decision on statutory interpretation, for these errors, if they exist, were harmless.

In judicial appeals from administrative decisions, trial courts may not reverse for errors which are non-prejudicial and harmless. *Ogilvie* v. *Review Board of Indiana Employment Security Division* (1972), 133 Ind. App. 664, 184 N.E. 2d 817; *Deszancsity* v. *Oliver Corp.* (1948), 118 Ind. App. 504, 81 N.E. 2d 703; 1 I.L.E., Administrative Law & Procedure, § 80; 73 C.J.S., Public Administrative Bodies & Procedure, § 252. *See Indiana University* v. *Hartwell* (1977), — Ind. App. —, 367 N.E. 2d 1090; *L. S. Ayres & Company* v. *Indianapolis Power & Light Co.* (1976), — Ind. App. —, 351 N.E. 2d 814.

Colonial received notice of the Department's decision by regular mail. The notice was mailed October 8, 1974, and received October 11, 1974—seventy (70) days after the administrative hearing. Colonial claims harmful error only in that it failed to receive notice to which it was entitled by statute. Colonial does not claim, nor can we perceive

any way in which it could claim, that its substantial rights were in any way compromised[2] by the Department's procedural irregularities.

As Colonial actually received notice of the Department's decision within a brief time after the sixty (60) day period, and as Colonial has been able to avail itself of full judicial review there has been no prejudice to its substantial rights. Therefore the error is harmless and cannot serve as a basis upon which to reverse the Department's decision.

Issue Two

CONCLUSION—The trial court incorrectly defined "public necessity" as that term is used in IND. CODE 28-1-2-26.

Public necessity is a substantial or obvious community need in light of attendant circumstances. It is a somewhat nebulous concept which requires more than mere convenience but less than absolute or indispensable need. *Farmers State Bank, LaGrange* v. *Dept. of Financial Institutions* (1976), — Ind. App. —, 355 N.E. 2d 277. *See VIP Limousine Service, Inc.* v. *Herider-Sinders, Inc.* (1976), —Ind. App. —, 355 N.E. 2d 441.

The trial court was mistaken in finding that the Department could rule there was no public necessity only if "another bank in the designated service area would have tended to seriously injure the existing financial institutions already there, and bring about bank failures."

Neither Colonial nor this court's research has revealed a single case in which public necessity for the establish-

[2] Ind. Rules of Procedure, TR. 61:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. *The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.* (emphasis added)

ment of a new bank was determined solely on whether its creation would endanger an existing financial institution.

Among the factors to be considered in determining public necessity are: a community's population, including size, composition, density and growth rate; economic growth projections; the community's current business situation; investments by other companies anticipating growth; and availability and quality of banking services provided by existing institutions. *Farmers State Bank, LaGrange* v. *Dept. of Financial Institutions, supra.*

Other factors which may be considered include: the number of banks recently chartered compared to projected growth, *Moran* v. *Nelson* (1948), 322 Mich. 230, 33 N.W. 2d 772; stimulation of banking competition within the community, *Second National Bank of Culpeper* v. *New Bank of Culpeper* (1974), 215 Va. 132, 210 S.E. 2d 136; and whether the community is "overbanked", *Western Pennsylvania National Bank* v. *Myres* (1962), 407 Pa. 298, 180 A. 2d 423.

Our decision as to what constitutes "public necessity" is controlled by *Farmers State Bank, LaGrange* v. *Dept. of Financial Institutions, supra.*

In the hearings before it the Department heard and considered a broad range of circumstances encompassing the various factors referred to above, and therefore acted properly in reaching its decision.

The remaining question is whether, using the proper definition of public necessity, the Department's denial of Colonial's application was supported by substantial evidence.

Issue Three

CONCLUSION—The Department's initial denial of Colonial's application was neither arbitrary nor capricious. and was supported by substantial evidence.

An administrative decision can only be overturned if it is not supported by substantial evidence or if uncontradicted facts show the decision to be arbitrary and capricious. The reviewing court can not substitute its judgment for that of the administrative body. *Dept. of Financial Institutions* v. *State Bank of Lizton* (1969), 253 Ind. 172, 252 N.E. 2d 248; *City of Indianapolis* v. *Nickel* (1975), — Ind. App. —, 331 N.E. 2d 760; *Indiana Alcoholic Beverage Commission* v. *Johnson* (1973), 158 Ind. App. 467, 303 N.E. 2d 64.

When the legislature creates a fact finding body of experts, their decision should not be overridden merely because the reviewing court may have reached a contrary opinion on the same evidence. *Dept. of Financial Institutions* v. *State Bank of Lizton, supra.*

In the present case, the Department's findings and conclusions in its initial denial of Colonial's application were neither capricious nor arbitrary and were supported by substantial evidence.

Among the factors considered by the Department in its denial were: The new bank offered no significant new services in its proposed service area; the proposed service area is close to Marion County and its residents have close economic ties to Marion County; the proposed service area contains the home office and branch of one bank, branches of two other banks and the approved location of a branch for an additional bank; Boone County's bank office to population ratio is greater than all but one of the surrounding counties; six branches of Indianapolis banks exist or are proposed adjacent to the new bank service area; several branch banks have been approved in the applicant's service area; and two new commercial banks were recently chartered in Hamilton County immediately adjacent to the proposed service area.

These facts clearly constitute a substantial basis upon which the Department could find that no public necessity existed at that time for a new bank in Zionsville. Consequently we find the trial court erred in reversing the Department's determination.

The judgment is reversed and this case is remanded to the trial court for further proceedings not inconsistent herewith. WHITE, J. and STATON, J. (by designation) CONCUR.

Appendix B

STATE OF INDIANA
Indianapolis 46204

CLERK OF THE SUPREME COURT AND COURT OF APPEALS
Billie R. McCullough, *Clerk*
217 State House
Telephone 633-5200

DEPT. OF FINANCIAL INSTITUTIONS
v.
COLONIAL BANK & TRUST CO.
No. 2-975A254

You are hereby notified that the Court of Appeal has on this day—Appellee's Petition for Rehearing DENIED. SULLIVAN, A.C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 10th day of August, 1978

Billie R. McCullough
Clerk Supreme Court and Court of Appeals

8/10/78

No. 2-975A254

I hereby acknowledge receipt of the above notice

_____, 197__

Attorney For _____

DEAN E. RICHARDS, Indpls.

THEO. L. SENDAK, *Atty. Genl.*

Return This Portion

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-887

COLONIAL BANK & TRUST COMPANY,
Petitioner,

vs.

DEPARTMENT OF FINANCIAL INSTITUTIONS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

THEODORE L. SENDAK
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Comes now the Department of Financial Institutions of the State of Indiana (hereafter Department), by Theodore L. Sendak, Attorney General of Indiana and Donald P. Bogard, Chief Counsel, and pursuant to Rule 24 of the Rules of this Court, submits its "Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Indiana."

OPINION BELOW

The opinion that Petitioner, Colonial Bank & Trust Company (hereafter Colonial), seeks to have this Court review

was issued by the Indiana Court of Appeals on May 11, 1978, styled as *Department of Financial Institutions vs. Colonial Bank & Trust Company*, 375 N.E. 2d 288 (Ind. App., 1978), See Petition Appendix (hereafter Pet. App.) p. 33. Colonial's Petition for Rehearing by the Indiana Court of Appeals was denied on August 10, 1978. Pet. App. 41. No Petition to Transfer to the Supreme Court of Indiana was filed by Colonial.

JURISDICTION

Colonial alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1257. The Department would submit that such jurisdiction is totally lacking since Colonial does not seek review of a decision of the highest court in Indiana which could render a decision in this matter as required by 28 U.S.C. § 1257. In addition, the Petition is not timely pursuant to 28 U.S.C. § 2101(c) in that the decision sought to be reviewed was issued more than ninety (90) days prior to the filing of the Petition and no petition for extension of time was filed by Colonial.

QUESTION PRESENTED FOR REVIEW

Whether this Court has jurisdiction to review the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 provides, in part, as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2101(c) provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

The Department accepts the Statement of the Case contained in the Petition.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

The Decision sought to be reviewed is not from the highest court of the State

Colonial seeks to have this Court review a decision of the Indiana Court of Appeals, an intermediate appellate court, and alleges jurisdiction in this Court pursuant to 28 U.S.C. § 1257. That statute provides for review by this Court of final judgments ". . . rendered by the highest court of a State in which a decision could be had . . ."

Rule AP. 11 of the Indiana Rules of Appellate Procedure provides, in part, as follows:

> **(A) Rehearings.** Application for a rehearing of any cause may be made by petition, separate from the briefs, signed by counsel, and filed with the clerk within twenty [20] days from rendition of the decision, stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs, but such briefs will not be received after the time allowed for filing the petition. Parties opposing the rehearing may file briefs within ten [10] days after the filing of the petition. No extension of time shall be granted for the filing of a petition for rehearing or any brief in connection therewith.
>
> **(B) Transfers.** In every case where a petition for rehearing has been filed in the Court of Appeals and denied, *the party against whom the decision is rendered shall have a right to petition the Supreme Court* within twenty [20] days from the day of the ruling on the petition for rehearing and [to] transfer said cause to the Supreme Court for review; Provided, however, That the petition to transfer shall be limited to only those grounds set forth in the petition for rehearing in the Court of Appeals. . . .
>
> (3) The opinion or memorandum decision of the Court of Appeals shall be final except where a petition to transfer has been granted by the Supreme Court. If transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, and the Supreme Court shall have jurisdiction of the appeal as if originally filed therein, and all the records, briefs and files of said cause on appeal shall be transferred to the Supreme Court.

> (4) The denial of a petition to transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court.
> (Emphasis Supplied).

Colonial candidly admits on pages 1 and 2 of its Petition that the decision sought to be reviewed is from the Indiana Court of Appeals, even though the caption of the Petition requests a writ to the Supreme Court of Indiana, and further admits that no "Petition to Review" was filed in the Supreme Court of Indiana. Since AP. 11(B) grants every party suffering an adverse decision in the Court of Appeals the *right* to petition the Supreme Court of Indiana for review, there is, therefore, no final judgment rendered in this cause "by the highest Court" of Indiana "in which a decision could be had." Thus, there is no jurisdiction pursuant to 28 U.S.C. § 1257. *Stratton v. Stratton,* 239 U.S. 55 (1915).

II.

The review sought is not timely

Even if the decision of the Indiana Court of Appeals was somehow reviewable by this Court (and Colonial has not shown any right to review under Rule 19 of the Rules of this Court), the Petition was not timely filed. The Court of Appeals decision was entered on May 11, 1978, Pet. p. 2, and the Petition for Rehearing was denied on August 10, 1978. Pet. App. p. 41. Pursuant to 28 U.S.C. § 2101(c), the Petition should have been filed in this Court by November 8, 1978, unless the time was extended. No petition for extension of time was filed, and the Petition for Writ of Certiorari was not filed until December 4, 1978. Therefore, the filing is not timely and the Writ should be denied.

CONCLUSION

For all the above and foregoing, the Department of Financial Institutions would urge this Court to disallow the Writ prayed for herein.

Respectfully submitted,

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